UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 15 Cr. 643 (PKC)

GARY HIRST,

Defendant.

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September 12, 2016
10:20 a.m.

Before:

HON. P. KEVIN CASTEL

District Judge
and a Jury

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: BRIAN R. BLAIS
AIMEE HECTOR
REBECCA G. MERMELSTEIN
Assistant United States Attorneys

SHER TREMONTE LLP
Attorneys for Defendant
BY: MICHAEL TREMONTE
JUSTINE A. HARRIS
NOAM KORATI BIALE

ALSO PRESENT:
SPECIAL AGENT SHANNON BIENIEK, FBI
ELLIE SHEINWALD, Paralegal
GARY SMITH, Paralegal
RYAN POLLOCK, Paralegal

(Case called)

THE DEPUTY CLERK: For the government, please.

MR. BLAIS: Good morning, your Honor. Brian Blais, Aimee Hector and Rebecca Mermelstein for the government.

Also with us at counsel table are paralegals Ellie Sheinwald and Gary Smith and FBI Special Agent Shannon Bieniek.

THE COURT: Good morning. For the defendant.

MR. TREMONTE: Michael Tremonte, Justine Harris and Noam Biale for Mr. Hirst. And with us at counsel table is Ryan Pollock, our paralegal.

THE COURT: Good morning to all.

One point I want to get out of the way is I want to make sure that, if there were any plea offers, that they have been communicated by defense counsel to Mr. Hirst.

So I don't want to know the details of them, but if you could begin, Mr. Blais, and then I will have Mr. Tremonte respond, and then I am going to ask Mr. Hirst to confirm.

MR. BLAIS: Yes, your Honor. There was no formal plea offer conveyed by the government in this case. There were discussions about what the parameter of a plea may look like, but it never ripened into the extension of a formal plea offer.

THE COURT: Mr. Tremonte.

MR. TREMONTE: That is correct, your Honor.

THE COURT: Were those unripened discussions transmitted to your client, Mr. Hirst?

MR. TREMONTE: They were, your Honor.

THE COURT: Mr. Hirst, you heard what Brian Blais, the attorney for the government has said, and you have heard what your lawyer, Michael Tremonte, has said. Is that accurate, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you have any questions? You don't have to put them to me right now in open court, but if there were any questions you had about those discussions, I would like to know whether you have any questions about them.

THE DEFENDANT: I don't have any, your Honor.

THE COURT: Because I would arrange for you to meet with Mr. Tremonte and for Mr. Tremonte to meet with Mr. Blais so that there was not even a chance of confusion.

THE DEFENDANT: I understand, your Honor.

THE COURT: Thank you.

So let me speak about the letters I have received this morning.

With regard to the opening statement, is there any issue regarding the defendant's use of the demonstrative exhibits, which I gather have been shown to the government?

MR. BLAIS: Yes. We are aware of those particular exhibits. We believe that they are going to come in as exhibits at trial, and we have no objection to them being used in opening.

THE COURT: How long does the government propose for an opening statement?

MR. BLAIS: Approximately 20 to 25 minutes, your Honor.

THE COURT: Ms. Harris, are you going to open?

MS. HARRIS: Yes, your Honor. Approximately 15 minutes, at most.

THE COURT: Excellent. Thank you.

With regard to the number of phone calls and the length, first let me get some facts down from the government.

What is the volume of calls, if you could begin with Gary Hirst, between Jason Galanis and Gary Hirst?

MR. BLAIS: Your Honor, I don't actually have that exact number at my fingertips. I think it's in the several hundred range, like six to eight hundred.

THE COURT: Hours?

MR. BLAIS: Sorry. Number of calls.

THE COURT: Then there is some larger number of calls that Mr. Galanis recorded that did not involve Mr. Hirst; is that correct?

MR. BLAIS: That's correct, your Honor. I believe there were approximately 33,000 calls and text messages during the relevant time period, of which, my recollection is, the number was approximately 19,000 that were text messages, the remainder of which were phone calls, which would be about

14,000 phone calls.

THE COURT: Let me hear from defense counsel and give you a preliminary reaction.

The probative value of the number of phone calls that Jared Galanis made in toto to persons other than Mr. Hirst seems to me to have no probative value whatsoever and invites jury speculation. Much the same can be said as to the number of phone calls with Mr. Hirst.

First of all, if there is any phone call between Mr. Hirst and Mr. Galanis that the defendant seeks to offer into evidence, they may offer it.

Now, when you offer it, it may be subject to an objection under the rules of evidence, but if it's admissible, that phone call comes in. And I can think of theories under which portions of phone calls might be admissible, and I can think of theories under which portions would be inadmissible. But I am not restricting the defendant's ability to offer as many phone calls as they want in evidence. But the number of phone calls as such invites speculation on the part of the jury.

I propose to tell the jury, as I do in virtually every criminal trial, that it is not the number of exhibits, it's not the number of witnesses, it's not the techniques that are used or not used, you are to decide this case based on the evidence or the lack of evidence in the case, and you are not to speculate why certain evidence wasn't offered by the government or by the defendant. That's unfair speculation by the jury.

Given that, what is the probative value of the number of calls between Mr. Galanis and Mr. Hirst?

MS. HARRIS: Your Honor, if I can address it.

I hear your Honor's point, and I just want to be clear that we are not raising the issue because we are launching an attack on investigative techniques or somehow suggesting that the government had a flaw in the way it conducted its investigation. Here, I think the relevance of the other calls, and I will focus particularly on the other calls between Jason Galanis and Gary Hirst, because that's really the universe of relevant issues. There's two independent reasons, I think, for evidentiary reasons it should come in.

First is that, as we explained in our letter, we are going to have a vigorous dispute about the meaning of the 10-second excerpt or the 15-second excerpt that the government is going to put in. The face of the call, that whole Shahini thing, they missed it, could be subject to interpretation about whether or not it was said with a nefarious intent, you know, sort of scheming, they missed it, aha, or whether, ha, they missed it, I've got to fix it. There's two different interpretations of that call.

So the absence that there are, let's say, I think the numbers are in the hundreds of other calls over that time period between Mr. Hirst and Mr. Galanis, the fact that Shahini, or anything related to the issues in this case frankly, or any kind of suggestion of scheming or working behind the back of the other professionals at Gerova, the absence of that evidence helps the jury understand which meaning, which interpretation of that call is the better one.

So the evidence of the other calls, the content of the other calls, or really in this case the absence of what is in the other calls, is important for the jury to understand just the meaning of the call itself.

So that's number one. It has nothing to do with sort of investigative techniques or speculation, but, rather, we really want to give the jury information to put that call in context.

The other issue is that --

THE COURT: Doesn't that arise and isn't it fair for you to say in argument, the government is hanging its hat in this case on a ten-second clip of a conversation between Galanis and Hirst, and that conversation is ambiguous and it could mean this and it could mean that, and you can't tell from this ten-second clip what it means, if that's your argument, and the government will say, no, that ten-second clip means as follows, and here is why. There are dueling inferences between the government and the defendant, which you're entitled to do. And you're also entitled to point out lack of evidence in the government's case.

But what I hear you saying is I want to bring out the number of calls because I want to bring out that these calls didn't mention Shahini, that these calls didn't make incriminating statements. And when you go that distance, now it seems to me that they are being offered for a different purpose, their truth.

MS. HARRIS: Actually, the rules of evidence are very clear, and we think it's clear and the case law is clear, that it's not hearsay. The absence of evidence is -- it's just like in a situation where it's a question mark. The absence of a statement is not itself a statement. It's not a statement that's even subject to the hearsay rules because it's not offered for the truth of any matter because there is no statement. It's just the absence of a statement and that is exempt from the context of the hearsay rule.

The other problem is, the fact that there is only one snippet of a call made, without the jury understanding that there were 250 other calls on which Shahini wasn't mentioned, nothing related to scheming behind the back of the board of directors, nothing about any of this, is that they are going to speculate an incorrect fact that this was maybe the only call recorded, and they can speculate in the other direction that this is maybe the only little snippet the government was able to capture, and only if they had captured weeks more of other calls, they would have gotten a bigger record.

THE COURT: Well, that would be improper speculation as well.

MS. HARRIS: Right. The truth here, and that's really what we want, is that there were this number of recorded calls. I think under the rule that the absence of evidence is not hearsay, we could theoretically, which we don't want to do because it would burden the Court and the jury, we could theoretically sit here and say, Gosh, jury, we are here to determine whether or not Mr. Hirst had criminal intent, whether he had a meeting of the minds with Jason Galanis. That is the central question in this case. For a period of a year the government recorded phone calls, 33,000 communications, some of which were texts, 14,000 phone calls over the course of the year in question here, and over hundreds of those were with Mr. Hirst and only ten seconds are being played for you and you're asked to determine what those ten seconds means.

Just in a logical sense, if I'm the fact finder, I think that makes a difference to understand and to help me figure out whether or not Mr. Gary Hirst had criminal intent, whether he was engaged in a criminal conspiracy with Jason Galanis. We don't want to play hundreds of phone calls to show them what is not on the phone calls, but part of the challenge of the defense in a case like this is proving the negative. The fact that there isn't those conversations over this period of time, even though they were talking hundreds of times, is relevant. Under the fundamental tenets of 401, for a fact finder it would tend to make it more likely that he wasn't acting with criminal intent.

So it's a very core part of our defense of what is going on in this case, about whether or not there was a meeting of the minds, and I think for the jury to hear that ten seconds without us being able to point out the lack of evidence on 250 or whatever it is other calls really creates an artificial picture for the jury, and we just want the facts to come out in this respect, your Honor.

THE COURT: Mr. Blais, this is not, I would think, a relatively new area. Even before there were recorded conversations there was correspondence. We also have a universe now that includes e-mails, and a witness is on the witness stand, the government witness is on the witness stand, and through that witness the government elicits a foundation for the admission of one e-mail. Isn't it fair cross-examination, How many e-mails did you, Mr. FBI Agent, obtain and review from the defendant pursuant to the search warrant? Wouldn't that be a fair question?

MR. BLAIS: Your Honor, it might be a fair question to ask the number of e-mails. I think what the defense is asking is for something more. They want to be able to, from what I am hearing, is make suggestions about the contents of those calls, i.e., that there was no mention of Shahini on any of those calls, which I think does go directly to the content of the phone calls, and I think would be an impermissible hearsay purpose.

We actually fundamentally disagree with the notion that the defendant would be able to introduce the contents of these phone conversations. Yes, there might be, in a certain limited way, the rule of completeness, a Rule 106 argument, that certain calls are necessary to explain this particular call, but we don't think that opens the door to admission of all of the calls.

And we disagree with the notion that the absence of the statement is nonhearsay. That would, as I think we argue in our papers, essentially allow for the admission of any statement ever made to show the absence of content in that particular statement. And we are not aware of any case that sweeps that broadly and it is a general practice in this district that defendants can't, for example, introduce the contents of the entire wiretap, or introduce the contents of an entire set of consensual recordings, to show what is not in them.

THE COURT: But you're going to have a witness on the stand. The witness is going to lay the foundation for the playing of the tape, correct?

MR. BLAIS: Correct.

THE COURT: The cross-examination would go something like this:

Was this the only conversation between Jason Galanis and Mr. Hirst? Answer: No.

Does the government have other recordings? Yes.

How many are there? Whatever the answer is the answer is.

MR. BLAIS: That is I think what the defense is proposing here.

I mean, the inference that they are seeking to argue, that because there were not certain conversations recorded in these phone conversations means that no criminal activity is afoot, I think is actually belied by what actually happened in this case. Despite the fact that he knew he was being recorded for a period of a year, Jason Galanis has admitted by pleading guilty in this case that he committed the very crimes that he was charged with.

THE COURT: That's not coming in before the jury, correct?

MR. BLAIS: Right. But certainly to rebut the inference that is being created that there was no criminal activity afoot because Shahini --

THE COURT: Listen, I don't have to rule on this today, and I am not going to rule on it today because you all can submit supplemental authority to me. But I think you're maybe making it broader than the defense is making it. I am sure the defense would like to advance that argument, but I think there is the argument that there were all these hours of conversations, and in these hours of conversations this is what you, ladies and gentlemen of the jury, are hearing, these ten seconds. That's all. In a context.

Now, your point, which may be a fair point, is, aha, there was no objection raised by the government, but in drug cases it's been unremarkable testimony that the wiretaps that have been played are part of so many hours of either Title III wiretaps or consensual recordings, and that testimony has come in without any objection nor discussion nor debate. I don't know whether half the time it's elicited by the government or half the time it's elicited by defense counsel, but I have never debate in a drug case over this.

MR. BLAIS: There are two different sort of flavors of arguments that are being suggested here, one of which I think is more proper than the other.

To the extent the argument is going to be, look, there were 800, or whatever the number is, recordings between Galanis and Hirst and the government only played one for you, that's an argument based purely on the number, and that's sort of one flavor of the argument.

The other argument that there are 800 recordings and those other 799 didn't say one word about Ymer Shahini, that's a very different argument that is actually going into the content of the specific recordings. I am not sure, frankly, that our witness is even going to be competent to speak on that particular issue, because I am not sure that person has listened to all 800 recordings between Hirst -- in fact, I know he hasn't listened to all 800 recordings between Hirst and Galanis. He is simply a tech person at the FBI who will confirm that the recording that is being placed before him is in fact maintained on the FBI systems, that it came in on a particular date and time. He is not going to be able to opine or offer testimony about the contents of those 800 recordings.

THE COURT: Why don't you let me in on a little secret just between us here in the courtroom and the court reporter and the public bystanders.

Is there a mention of Shahini on the other hours?

MR. BLAIS: Not that we are aware of.

THE COURT: All right.

MR. TREMONTE: Your Honor, it's not argument. May I have permission to close the blind?

THE COURT: Go right ahead.

MR. TREMONTE: Sorry.

THE COURT: Thank you.

MR. BLAIS: Your Honor, I think the point on the latter issue of Shahini not being mentioned on the call, I think we would obviously want to be able to respond and rebut that point, of course they weren't discussing about Shahini generally because Galanis was aware that he was being recorded and would steer conversations away from those kinds of topics.

THE COURT: You might do that, but you have to consider whether you're opening a door when you go that route.

MR. BLAIS: I think that's a door we would be happy to open.

THE COURT: All right.

MR. BLAIS: It certainly has the possibility of creating a sideshow about the nature of Galanis's involvement, why he was being recorded in the first place and all of that. But we do think it is relevant, obviously, that Mr. Galanis was aware that he was being recorded, and it would certainly be his motive to steer conversations away from criminal-type conversations because agents were listening to his calls and he knew that fact.

THE COURT: Refresh my recollection again. Who first raised Shahini in the phone call?

MR. BLAIS: Mr. Hirst.

THE COURT: So that I understand where the parties are right now, the government would not object to eliciting the number of consensually recorded calls; is that where the government is at this stage?

MR. BLAIS: I think we do object to that, your Honor. There are other reasons we articulated in our briefing on this issue, which haven't yet been mentioned, including the Rule 405 argument, it's generally not allowed for any party to use specific instances of conduct to prove good character, which we think is what is essentially --

THE COURT: I don't get that argument. In the absence of case law to support it, I don't see it as good conduct argument.

MR. BLAIS: I think there is case law that we pointed out. I think the example that is often used is if you think of a circumstance where, having a trial on exactly this issue, where the defendants were officers of a union and the government was calling 15 or so employers who were going to say we paid bribes to these union officers, and the court in that case ruled, well, the defense can't call the other 45 employers who are organized by this union to say that they didn't get a bribe.

THE COURT: I understand that. But how does that apply here?

MR. BLAIS: I think that's exactly the inference that is trying to be drawn here. The government is only offering this one call. These other 799 must be innocent, and so there is no criminal conduct afoot, hence, my client doesn't have the necessary criminal intent. I think they are actually quite akin.

THE COURT: I will let you respond, Ms. Harris, but both sides will have the privilege of digging deeper and seeing whether you can bring this closer to home.

Ms. Harris.

MS. HARRIS: Just briefly, your Honor. I do think, as your Honor noted, in a wiretap case both sides, depending on what the facts were, would be ready to inquire on cross or direct about the number of calls recorded. And, certainly, I think were the facts going the other way, I think it would be likely the government would want to point out that out of 200 calls that they are talking about over and over again, in any kind of conspiracy case, drug case, fraud case, the volume of contacts about the subject matter at hand, or the lack of volume of contacts, is going to be a relevant fact. And I think ultimately what I hear the government objecting to is more about what inferences or arguments are going to be drawn from the evidence rather than per se objections to the relevancy and the nonhearsay, though I understand they have a different view of the law on this, but the nonhearsay quality of the absence of evidence.

THE COURT: Let me ask you this. If I ruled your way, should I also allow the government to explain the context for the recorded calls to explain why it's plausible that this topic was not discussed in the other calls?

MS. HARRIS: Your Honor, I think that's appropriately an argument they would want to make and should be able to make about the inferences from the call, but I do agree with your Honor that it does open that topic to full inquiry about his conduct while he was making those recorded calls, other issues surrounding that aspect of the case, which frankly have always been presented to us on the defense as collateral, irrelevant and whatnot. If that's an argument they want to make about the calls, obviously, that's their prerogative.

THE COURT: Enough on that. Let me talk about the expert.

First of all, on the expert issue, let me hear what the government proposes to do with regard to bylaws and the like through its witnesses. Is it going to call a witness who is going to say, I have looked at the bylaws, I have looked at the charter, and an individual director does not have this authority?

MR. BLAIS: We were not intending to do what your Honor proposed. I think there is a slightly different spin. I think we were, one, intending to introduce the bylaws; two, to focus on one specific provision, which involves the issuance of shares; and then, three, ask percipient witnesses, who are members of the board of directors, what their understanding was as to what the bylaws said about the issuance of shares.

THE COURT: That's what I am asking you. What about as to authority of a single director?

MR. BLAIS: We were not going to explore that issue.

THE COURT: All right.

Does the government seek to have me charge the jury on any point of Cayman Islands law?

MR. BLAIS: No, your Honor.

THE COURT: What is the basis for your objection to the defendant calling a witness to testify what that witness sees in the bylaws?

MR. BLAIS: We have no objection as a general matter to the witness stating what the bylaws say.

THE COURT: Or the charter.

MR. BLAIS: Or the charter.

THE COURT: Your point is restricted to Cayman Islands law.

MR. BLAIS: Correct. I think what this witness will be doing, beyond just saying here is what the bylaws say, here is what the articles say, will be saying, and my opinion is that under Cayman Islands law certain actions that were taken were appropriate or in conformity with Cayman Islands law.

This is not an issue that is litigated all that frequently, but Rule 26.1 does state that it's the court's role to determine what foreign law requires. That can be based on testimony, including the testimony of experts, but it's a legal issue, not a factual issue, and one for the court to resolve, not for the jury to resolve. That's the point.

MR. BIALE: If I could just address a couple of those issues.

First of all, on the Court making a determination as a matter of law on Cayman Islands law, that's fine with us. We can have our witness. He is in Hong Kong right now, as we mentioned in our letter, but as soon as he is back, he can come and we can have a hearing out of the presence of the jury.

We fundamentally object to the notion that they are going to have lay witnesses testify about the interpretation of the charter of the company and what the board resolutions mean. These resolutions are governed under the law of Cayman Islands law, which we are just proposing to have an expert who will act primarily in a summary capacity, like going through those board minutes that they are seeking to introduce and give his limited opinion that under Cayman Islands law, what the board minutes provides gives certain authorizations for Mr. Hirst to do what he did.

THE COURT: There are multiple concepts in what you just said. One is an objection to the government's witnesses, right?

MR. BIALE: Correct.

THE COURT: Then I can't tell whether you're saying that I should not decide the issue of Cayman Islands law, or you're talking about a hypothetical world in which I overruled your objection, and then what you would want to do in that context I am a little bit lost.

You object to what the government is offering, right?

MR. BIALE: Yes. We object to the government having lay witnesses opine on what the board resolutions and the articles of association require. We would like to have our expert on Cayman Islands law testify about that. If your Honor would prefer to make a finding under Cayman Islands law --

THE COURT: In other words, you would prefer to have your witness testify but not the government's witness; is that what you're telling me?

MR. BIALE: That's correct.

THE COURT: That sounds swell.

MR. BIALE: If the government would like to have their own witness testify about what these resolutions and charters mean in the context of Cayman Islands law, that would be fine. They haven't given us notice of any such expert, but we gave notice in order to have an expert give that testimony, and we think the jury ought to be able to hear it. I don't think that's inconsistent with our objection having lay witnesses offer an opinion on the meaning of those documents.

THE COURT: I apologize for not fully grasping the point, but this is what I am going to direct you to do.

I don't need to hear anything in particular about the -- well, let me amend this.

If there is any point of law, Cayman Islands law, in which you wish the Court to charge the jury, because an issue of foreign law is for the Court, then what I will require you to do is submit the proposed instruction together with an affidavit from your foreign law expert as to the basis in foreign law for them.

Now, if you choose to go the route you have gone of simply saying, here's a treatise, it's somewhere in here, I doubt you will persuade the Court of the validity of your point of Cayman Islands law. You have some burden of persuasion on the point of Cayman Islands law that you wish to have me charge the jury. So it won't be enough, because if somebody comes into my courtroom and says, oh, I'm entitled to do this, where is it, it's in the Federal Rules of Evidence, I don't find that argument very persuasive, and I doubt I will find your expert's argument persuasive. So I will require that by the end of the day on Wednesday.

MR. BIALE: Understood, your Honor.

THE COURT: Anything else before we adjourn for our jurors?

MR. BLAIS: There were just a couple of unresolved motions in limine beyond the things that we talked about.

THE COURT: Go ahead.

MR. BLAIS: I will just tick through them very quickly. There was an issue regarding 404(b) evidence and the introduction of the nature of Mr. Hirst's relationship to a company called Rineon. There was some briefing on that.

THE COURT: Right.

MR. BLAIS: Secondly, there was briefing on the issue of whether Mr. Hirst could introduce evidence of the fact that he met with FBI agents in or about 2013.

Then I think there was one lingering issue from the pretrial conference ten days ago regarding Mr. Hirst's ability to introduce the statement that Galanis made to agents and prosecutors in California that he had withheld information from Hirst in connection with a past investment opportunity, and I think your Honor said at the conference you would reserve on that issue. Those are the three that I have.

MR. TREMONTE: Your Honor, just to sort of clean up the tail end of our colloquy about the summary witnesses, I just want to make sure I am clear on the state of play as of now. We have now a submission that we are going to make by the end of the day Wednesday on the foreign law issue, and that will play out however it plays out.

We would still like to have Mr. -- I am just going to say Jan, because his last name is unpronounceable, testify as a summary witness, much in the same way, as I understand it, the government intends to call Professor Laby as a summary witness on -- frankly, I am still a little unclear on exactly what he is going to testify about, but I think it's the public filings that are issued in this case as a summary witness.

(Continued on next page)

THE COURT: That can be included in your submission on Wednesday, and that may, to a certain extent, turn on what the testimony is in this case. It seems to me that it is not a legal opinion to ask a director, "As a director of the corporation, are you required to know the contents of the charter and the bylaws of this corporation?" And the answer may very well be, "Yes." "Does that charter address the issuance of stock or the transfer of stock?" "Yes, it does." "What is your understanding of what it provides?" I don't know that that is a legal opinion, and that's what I heard the government wishes to do. And, of course, if you want to call a director who is going to say, "That's absurd. That's the wrong paragraph. I've been director of this corporation for years, and it provides -- the word "not" was left out in that gentleman's testimony."

MR. TREMONTE: I think that's right, your Honor. As long as there's a foundation for the understanding that that individual witness formed, and as long as we have an opportunity to test the accuracy and adequacy of the foundation and the coherence of the understanding that was formed, that seems just right to me.

But here, a couple of things. One, I'm not sure how related they are, but first of all, there's an allegation in the indictment that a requirement existed that's not an allegation that individuals involved in the company formed an understanding as to the relevant requirements, it is alleged as a legal requirement. That is why we prepared to address it the only way that seemed to us admissible, which is through the testimony of a competent witness. None of the government's witnesses, as we understand them, are competent to address that allegation.

THE COURT: Yes, but tell me what you say the government contends is that requirement. What are you meeting? Tell me what you're purporting to meet.

MR. TREMONTE: As I understand the allegation in the indictment, and maybe Mr. Blais can clear that up, the indictment appears to allege, although it's not crystal clear, that share issuances require advanced board approval. That is straight up an assertion of what Cayman Islands law means. That is separate and apart from the view that was formed in realtime by any witness the government proposes to put on the stand. That's why we want to introduce the expert testimony, because we don't believe there's any other competent evidence available to resolve this point for the jury.

THE COURT: I realize that sometimes the judge is the person most in the dark, and in this context I feel like I am the person most in the dark. But hearing what you say, it seems to me, if the charter and the bylaws contain such a requirement, I don't understand what the point of Cayman Island law would be. And maybe the point of Cayman Island law would be that the charter and the bylaws are invalid and they conflict with the statute, and if persuaded of that, I will so instruct the jury.

MR. TREMONTE: Well, actually, I don't think there are bylaws, I think it's a mistake in the indictment. There's an organizational founding document called the articles of association. That document does not squarely address this issue. There are board resolutions that address relevant issues, and I think there's fair argument as to what those resolutions mean. But that argument cannot be resolved by any witness other than a lawyer expert. That's the issue. If the government had charged that the individuals who were running the company formed an understanding and agreed to be bound by it, that would be one thing, but that's not what they said. They say the law requires X. The articles of association are not clear on what the company requires in connection with the issuances of stock, nor do the specific resolutions, to the extent that there are resolutions that address it. I think it's pretty clear, actually, that they authorize what was done, and there just is no other way to inform the jury through competent evidence except through the opinion of somebody who understands Cayman law.

THE COURT: So are you moving to dismiss the indictment? Is that what you're doing?

MS. HARRIS: Your Honor, if I could chime in, as well.

I apologize. All of this goes to what the government is alleging is Mr. Hirst's state of mind. That he had obligations and duties to disclose and, therefore, his failure to disclose is relevant to the case. This is one little piece of establishing an alleged duty to disclose. So the fact that we believe that the articles of association, the board resolutions, and the minutes do not affirmatively establish a duty to disclose, it's very relevant to, again, his state of mind. These are dense documents. There's a stack of board meeting minutes, there's multiple resolutions, there is a long articles of association, and so I just want to reiterate that fundamentally, our proposed witness, just like the government has said, it's going to be a summary witness. He's going to help walk the jury through and point to the relevant provisions. So a fundamental level, we don't even need -- I think that at the margins, the issues about legal requirements and how certain provisions are interpreted become then an issue of legal opinion because our expert is familiar with corporate law, the case law, the common law systems on the Cayman Islands and how, if there's ambiguity in the board documents, they should be interpreted under the law. We can address that, I think, as additional submissions are made, and when we're closer in time, and your Honor has heard more of the evidence in the case and some of the opinions of the lay witnesses that the government is going to offer. But first and foremost, we're going to have a big dispute about what those documents say, and we want our witness to be able to walk the jury through them. We can reserve, I think, on the issue of whether he offers further -- if there's a question of interpretation after the government witnesses have been presented, we can then readdress that issue for your Honor.

THE COURT: Yes. I intuitively feel that this issue is going to look very different after the direct and cross of the government's witnesses. And it also sounds like some of the points that you want to make will first emerge in the cross examination. Not saying that you can't therefore raise it in your own case; I have to see, but they certainly sound to me like they would be fair grounds for cross examination in the first instance, and then whether you can also offer a summary witness, and whether you can offer or you get an instruction on Cayman Islands law, that still remains an open issue.

Why don't we take a break and await our jurors. I had marked as Court Exhibit 1, which is a document which is an aid to memory in this case, and I understand it's been given to each side. It is not a questionnaire, nor is it the questions in their entirety that I propose to ask the jurors. As some of my colleagues on this court do, I use it as a point of recollection about certain questions that have been asked in the past, but where there is a "yes" answer, it is my practice to follow up with followup questions. And if there are people at counsel table who are not in there, don't worry about it, I'm going to have you introduce your counsel table and your team and the names in there. So that's the use to which this is put. All right?

MR. BLAIS: Your Honor, may we raise one question about the jury selection process?

THE COURT: Yes.

MR. BLAIS: There was, I think, some confusion on our end after the pretrial conference about the exact order that peremptories would be offered by either side. I think the process we're most typically familiar with is that there are six rounds of peremptories. In the first four, the government exercises one, and the defense exercises two, and the fifth round it's one and one, but I don't know if that's the procedure your Honor follows or if it's different.

THE COURT: No, it's not.

MR. BLAIS: Can you explain the process that your Honor follows?

THE COURT: There would be six alternating rounds on peremptories, then there would be a seventh, eighth, ninth, and a tenth in which the government would not have a strike, but the defendant would.

MR. BLAIS: Understood.

THE COURT: Okay?

MS. HARRIS: Just briefly, your Honor. I know

Mr. Blais had raised -- we monopolized the conversation by talking about the expert, and I apologize, but it raised some additional issues. Some of those I think we can defer until closer in time to the evidence, if it becomes ripe again, but the one issue it might be helpful for the parties to address now is the question of what we would term the 404(b) issues related to the government's presentation of evidence regarding the other entities, Rineon, and Mr. Hirst's involvement with Rineon. So that would be one issue to address at some point before closing.

THE COURT: One of the points that I want to hear from the government on is how much of this is evidence of the charged conspiracy. What related to this entity is necessary to lay out the charged conspiracy, and what of it are you offering on some other basis?

MR. BLAIS: Your Honor, Rineon is the necessary element of the charged conspiracy for two reasons. One is there are allegations in the indictment that, after the Shahini shares are issued, they're initially sold into the market, and it tanks the price of the stock. At that point, Mr. Galanis and others of the coconspirators make arrangements with what we characterize as corrupt investment advisers to basically engage in matched trading to stabilize the price of the stock.

The first such arrangement that Mr. Galanis enters is with the principals of an investment advisory firm called

Martin Kelly Capital, and the deal that he strikes is that the principals of Martin Kelly Capital will buy shares of Gerova at the direction of Mr. Galanis and his coconspirators, and in exchange for doing that, they will get for their clients free shares in two other companies that Galanis controls; one of them not relevant for purposes of this discussion, the second of those companies is Rineon.

Rineon is one of the components of the quid pro quo arrangement by which these matched trading conduct is set up, so that's the first point of relevance.

The second point of relevance is Gerova itself. The company that's really at the heart of the allegations in the indictment was formed in early 2010 by basically putting together three different, I'll call them assets for purposes of this discussion. There was a group of assets from one hedge fund called Stillwater, there was a group of another assets from a different hedge fund called Weston, and then there was an insurance company called Amalphis that became really the operating core of Gerova. And what the, I think, vision for Gerova was was that that insurance company, Amalphis, would use those illiquid hedge fund assets as regulatory capital to grow the insurance business.

Amalphis, the insurance company that became part of Gerova, was purchased from Rineon. Gerova's interest in Amalphis was purchased from Rineon, and Rineon became, as a result of that transaction, the largest shareholder in Gerova.

Rineon is part of, if you will, the background story of explaining how Gerova came to be. There was a significant asset that was purchased from Rineon, and it became part of Gerova.

In terms of what we intend to elicit about Mr. Hirst's involvement with Rineon, I think the extent of it will be two or three questions. There's a witness who was an officer of Rineon during the relevant time period who will be able to say that Mr. Hirst assisted in some insurance company acquisitions, in insurance company due diligence type activities at Rineon, and that Mr. Hirst was a shareholder of Rineon. That's, I think, the extent of the involvement, but we do think that Rineon is directly relevant and part of explaining the charged conspiracy.

Part of the reason we didn't provide 404(b) notice on this is because we don't think it's 404(b), we think it's part of the charged conspiracy itself.

THE COURT: Ms. Harris.

MS. HARRIS: We don't have any objection to Rineon being mentioned. They can tell the story of Rineon and Gerova. The issue here is that Mr. Hirst, who effectively was a shareholder, and I think it was under 5 percent, a very small stake in that entity, will be misleading and risks into 403 territory of being more prejudicial and unfairly prejudicial than relevant because, as Mr. Blais, just explained, it was Rineon's stock that was later dumped on these unsuspecting investors in the matched trading scheme, and as we've said from the beginning in our in limine motions, there's very little evidence here. We understand Pinkerton, we understand the foreseeability test, but there's really very little evidence that connects Mr. Hirst with that subsequent conduct, and there's really no direct evidence or any suggestion by the government to date that there's knowledge of that conduct, which is ugly, terrible conduct; pumping up the price of stock, matched trading, and pilfering the accounts of unsuspecting investors. The risk here is by connecting him to Rineon, and then the jury hearing that Rineon stock was put back into these customers' accounts, it risks the jury speculating that there's a connection between Mr. Hirst and that subsequent conduct that there simply isn't. There just isn't that connection and knowledge.

We're happy for the government to tell the story of Rineon, but Mr. Hirst's, as he said, just very tangential connection to it isn't necessary for their story. It doesn't establish anything with respect to the elements of the charges against him.

THE COURT: In other words, you're only seeking to preclude his share ownership. Is that the only thing you're seeking to preclude?

MS. HARRIS: I think the other question Mr. Blais said about some assistance he had given Rineon with respect to acquisition of some funds. Any connection between Mr. Hirst and Rineon, which even by the government's description is relatively two or three questions, tangential to the story.

THE COURT: Their two or three questions doesn't make it tangential, the fact that it's tangential and there will be no questions. The question is, does it have probative value? That's really on the charged conspiracy, and then of course whether it should be precluded under 403, of course.

MS. HARRIS: I think that there's actually no probative value for that case as to Mr. Hirst. The fact that he was a shareholder in Rineon, under 5 percent, and whatever other --

THE COURT: When you say "under 5 percent", was it more than 1 percent of the shares?

MS. HARRIS: I don't know the exact number. Right. I don't know the exact number, your Honor, and I don't know what --

THE COURT: It may be relevant on a 403(b) analysis that he had two shares of it. It may make a difference, as opposed to having 2 percent of the stock, some such thing.

MS. HARRIS: Obviously, our position, your Honor, is that even if it was 10 percent, or 2 percent, or 1 percent, that the fact that he was a shareholder in that entity doesn't make it more likely that he had the criminal intent to engage in this fraud about the foreign nominee and get shares through Shahini. There's no connection to the particular conduct about whether or not he entered into a criminal conspiracy with Jason Galanis for that specific purpose.

THE COURT: Let me hear Mr. Blais.

MR. BLAIS: I actually do think it's relevant because I think there will be evidence from our witness that Jason Galanis was the person who controlled Rineon. So to the extent that they intend to argue some inference that Mr. Hirst had limited connections to Jason Galanis, that it was just to the extent of the evidence that we are offering about Gerova, no, they have connections in other ways, as well, including common investments in Rineon, and we think that's relevant to the story to suggest.

As I think we noted, it is a legitimate 404(b) purpose -- to the extent that it's not considered part of the evidence of this particular conspiracy -- it's a legitimate 404(b) purpose to show connections between conspirators, and the fact that there's a common investment in this company Rineon I think is relevant to showing the connections between Mr. Hirst and Mr. Galanis.

MS. HARRIS: Sorry, your Honor, but what Mr. Blais just articulated does put that then squarely into the 404(b) context, which is that there's other common connections which suggests a propensity to repeatedly engage in fraudulent investment schemes together with Mr. Galanis.

We're not going to be disputing the fact that they have lots of contact and lots of business connections. That's not a significant area of dispute. It's not like in a drug conspiracy where the fact that they know each other or not is going to be an issue.

THE COURT: Well, look. I'm delighted to have bright and experienced lawyers in this case. I really am. It makes my job a lot easier. But the government is allowed to put on the proof. The fact that the defense doesn't dispute that there was multifaceted connections and they knew one another does not foreclose the government from offering the evidence.

I'll tell you where I am on this. It seems to me that it is background to the conspiracy evidence. That the government is entitled to introduce it. But the one question that I raise is, I would like to know more about not only the position number of shares held in the entity, but also were they acquired on the New York Stock Exchange? Is this some unfortunate coincidence which would lead me under 403(b) to exclude it? If it's just through bad luck the man bought 50 shares in this company and now somebody's trying to draw some inference from the fact that he bought 50 shares on the New York Stock Exchange, I don't think that comes in. The probative value is substantially outweighed by the danger of unfair prejudice and jury confusion. So I'm certainly reserving on that, depending on what you may say. But assuming it is a substantial position and it does bear on the connection and the background between two coconspirators, I will allow it. So that's where we are.

Why don't we take a break in advance of our jury coming in. Don't go too far. Thank you.

(Recess)

(Jury selection commences)

(Adjourned to September 13, 2016, at 9:45 a.m.)